

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CALVIN YUEN,)	Civ. No. 07-00116 SOM-BMK
)	
Plaintiff,)	
)	
vs.)	
)	
LONGS DRUG STORES)	
CALIFORNIA, INC., a California)	
Corporation,)	
)	
Defendant.)	
_____)	

FINDING AND RECOMMENDATION THAT CASE BE DISMISSED
WITHOUT PREJUDICE

This action was filed on March 5, 2007. On May 9, Plaintiff Calvin Yuen passed away. Rule 25 of the Federal Rules of Civil Procedure provides that “[u]nless the motion for substitution is made not later than 90 days after the death is suggested upon the record . . . the action shall be dismissed as to the deceased party.” Fed. R. Civ. P. 25(a)(1).

Here, Plaintiffs’ attorneys have indicated that the representatives of the decedent waive their right to move for substitution under Rule 25. In light of this waiver, the Court issued an Order to Show Cause why this case should not be dismissed. A hearing was held on August 2, 2007. Defendants oppose dismissal of this action by the Court. They argue that this should more properly be

considered a voluntary dismissal under Rule 41(a)(2). They contend that the Court does not have the ability to dismiss this action under Rule 25 prior to the expiration of the 90 day period in which a motion for substitution may be made.

The Court hereby FINDS that these arguments have no merit. Rule 25 provides only that the Court “shall” dismiss the action if no motion for substitution is made within the prescribed time period, it does not prohibit the Court from dismissing the action prior to that time if the representatives of the deceased party indicate that they do not intend to file a motion for substitution.

The Court therefore RECOMMENDS that this case be dismissed without prejudice.

IT IS SO FOUND AND RECOMMENDED.



/s/ Barry M. Kurren
United States Magistrate Judge
Dated: August 3, 2007

Yuen v. Longs Drug Stores California, Inc., Civ. No. 07-00116 SOM-BMK; FINDING AND RECOMMENDATION THAT CASE BE DISMISSED WITHOUT PREJUDICE.